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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: EAC 01 190 54781 Office: VERMONT SERVICE CENTER Date: MAY 29 2003

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a company operating in the State of New York that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on the ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief. Counsel states, in part, that the small size of the petitioner's business does not disqualify the beneficiary from consideration as a multinational executive or manager.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

> (1) Priority Workers. - - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. - - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is related to J.F. Enterprises Pvt. Ltd. of Pakistan; (2) imports leather goods; and (3) employs four persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently, but it does not state the beneficiary's intended salary.

The issue to be discussed in this proceeding is whether the proffered position of president is in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

At the time of filing the petition with the Vermont Service Center on July 18, 2001, the petitioner failed to state the job duties that the beneficiary would perform as its president. Therefore, on October 17, 2001, the director requested the petitioner submit, in part:

- 1999 and 2000 United States federal income tax returns with all schedules and attachments for the petitioner.
- Quarterly tax returns for 2001.
- Evidence of staffing of the U.S. organization to include the number of employees, their titles and duties, the management and personnel structure of the company, and evidence of payment to employees.
- A breakdown of the number of hours devoted to each of the beneficiary's job duties in the United States.
- W-2/1099 and W-3/1096 forms for 1999 and 2000.
- Corporate tax returns if the petitioner is organized as a corporation, or the individual owner's individual tax return (Form 1040) and Schedule C, if the petitioner is organized as a corporation.

In response, counsel submitted a copy of the beneficiary's 1999 personal income tax return (Form 1040) without Schedule C, and his 1999 W-2 Wage and Tax Statement. Neither counsel nor the petitioner submitted any other requested evidence, or explained why the evidence was not submitted.

In the denial letter, the director noted that the petitioner failed to submit requested evidence. Based upon the evidence in the record, the director stated that the beneficiary would not be working in a managerial or executive capacity because, without a staff of employees, he would necessarily perform the services of the organization.

On appeal, counsel states that: "[A]s the decision fails to address any specific legal basis for [the] decision, we can only speculate

that the petitioner's failure to supply an onerous list of unnecessary and irrelevant documents requests [sic] has irritated the examiner and resulted in a "knee jerk" denial." Counsel also notes that the director recently approved an L-1A petition for an extension of the beneficiary's stay.

According to counsel, the petitioner is a small business that outsources many of its operational tasks. Counsel states that clerical duties are performed by a secretary/receptionist who is shared among other companies in the petitioner's office building, and whose salary is part of the petitioner's monthly recent. Counsel also states that the petitioner employs two contractual sales agents who are paid a minimal salary and whose primary source of income are the commissions they make on their sales. Finally, counsel states that other services such as shipping and warehousing, and accounting and bookkeeping, are also performed by outside contractors.

Regarding the beneficiary's role with the petitioner, counsel states that the beneficiary: (1) operates at the highest level within the organization and exercises discretion over the day-to-day operation of the business; (2) exercises total control over the selection of outside contractors and the manner in which these contractors perform their duties; and (3) is personally responsible for developing new business ventures and negotiating major contracts. Counsel notes that the director correctly asserted that the petitioner failed to provide the number of its employees, its gross annual income, or its net annual income. Counsel claims, however, that this information was provided in a supporting cover letter and substantiated by tax returns.

Counsel's statements on appeal do not merit a withdrawal of the director's decision to deny the petition. Although counsel correctly asserts on appeal that the size of the petitioner, by itself, may not be the basis for denying a petition, the evidence fails to establish that the beneficiary would primarily execute the high level responsibilities that are specified in the definition of managerial or executive capacity.

As previously stated, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). The petitioner has never identified the duties the beneficiary performs as its president. Counsel presumes that the approval of an L-1A petition on the beneficiary's behalf as well as his own assertions regarding the beneficiary's job responsibilities, are sufficient reasons to approve this immigrant petition. Counsel's presumptions are, however, incorrect. The statements of counsel regarding the beneficiary's duties are not an acceptable substitute for a letter from the petitioner that clearly states the duties to be performed. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of*

Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, the Administrative Appeals Office notes that it cannot determine whether the beneficiary was granted L-1A nonimmigrant status in error without reviewing the original record in its entirety. If, however, the nonimmigrant petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, the approval of that petition would have been erroneous. The Bureau is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The petitioner must establish that the beneficiary qualifies for this immigrant visa classification regardless of any nonimmigrant petitions that the Bureau may have approved on the beneficiary's behalf.

In addition to the petitioner's failure to clearly describe the duties to be performed by the beneficiary and explain how those duties are the high level responsibilities of a manager or executive, the petitioner has failed to substantiate counsel's claim that it employs contractual personnel to perform daily operational tasks.

According to counsel:

> The evidence submitted with the application and follow up documentation clearly shows that the beneficiary has total discretion in the hiring of all personnel and outside contractors as well as all sales agents. These include Spardo International Services[,] which ships and warehouses the goods sold in the United States, Gerald Abrams, the accountant who prepares and maintains the books of the corporation, and Mian Saber and Atif Rafiq who serve as employees and two outside agents [sic].

Contrary to counsel's statements, nothing in the record "clearly shows" that the petitioner employs outside contracted personnel whom the beneficiary directs and controls. The petitioner has not submitted a contract between it and Spardo International Services (Spardo) to show that this company ships and warehouses goods for the petitioner, or the level of control, if any, that the beneficiary exerts over the terms of the contract. The petitioner has submitted only two invoices from Spardo, neither of which establishes the relationship between the two companies. Similarly, the petitioner's employment contracts with [redacted] and [redacted] its alleged sales agents, are not supported by any corroborating evidence. The petitioner has not submitted any wage and tax statements, such as Form 1099-MISC, to establish that it paid either individual his 10% commission for sales. Furthermore, neither employment contract specifies the authority that the beneficiary exercises over each individual's work.

Finally, the petitioner has not submitted any evidence that it shares a receptionist/secretary with other offices in its building. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Even if the petitioner had established that it employs the individuals and firm it claims, there is no evidence that these parties handle all of the tasks necessary for the petitioner to provide its services. The petitioner has failed to show that the beneficiary manages or directs the provision of its services rather than performing the tasks necessary for the petitioner to provide its services in the import arena. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California, id.*

Regarding counsel's assertion that the director issued a "knee jerk" denial of this petition because the petitioner failed to respond to the director's request for documentation, again, counsel's statement has no merit. A director may request any evidence he deems necessary to determine whether a petitioner is eligible for a benefit sought, if initial evidence submitted with a petition was deficient. 8 C.F.R. § 103.2(b)(8). Although counsel characterizes the director's request for additional evidence as "onerous," a review of the request for evidence reveals that the director sought a minimal amount of documentation only. If the Bureau requests any evidence in support of a petition, the burden is on the petitioner to supply that evidence, not to question whether the request was appropriate. *See* 8 C.F.R. § 103.2(b)(11).

Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition shall not be disturbed.

Beyond the decision of the director, the evidence fails to show that: (1) a qualifying foreign entity exists, (2) the beneficiary was employed in an executive or managerial capacity by a qualifying foreign entity; and (3) the petitioner had been doing business for at least one year at the time the petition was filed.

Regarding the relationship between the petitioner and the Pakistani entity, a petitioner must establish that the qualifying entity, or its affiliate or subsidiary, conducts business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). The petitioner claims that it has a qualifying relationship with J.F. Enterprises Pvt. Ltd. However, the petitioner has not presented any documentary evidence, such as

copies of stock certificates or corporate tax returns, to establish the ownership and control of the U.S. and foreign entities. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (Comm. 1988) (in nonimmigrant visa proceedings). Therefore, there is no evidence that the petitioner and the foreign entity have an affiliate or parent/subsidiary relationship. As the petitioner has not established the existence of a qualifying foreign entity, the beneficiary cannot meet the requirements of 8 C.F.R § 204.5(j)(3)(i)(B), which calls for the employment of the beneficiary by the qualifying foreign entity for at least one year in the three years immediately preceding the beneficiary's entry into the United States in a nonimmigrant status.

Finally, regarding the petitioner's business operations, 8 C.F.R. § 204.5(j)(3)(i)(D) requires a petitioner to establish that it had been doing business for at least one year at the time the petition was filed. The term *doing business* is defined as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." 8 C.F.R. § 204.5(j)(2). Although requested by the director, the petitioner declined to submit copies of its corporate income tax returns to show its gross receipts or sales. To show that it had been doing business, the petitioner submitted only eight copies of invoices dated in 1999. These invoices, by themselves, are insufficient to show that the petitioner derived an income from regularly, systematically and continuously providing goods. Accordingly, the petitioner has also failed to show that it had been doing business for the requisite period of time.

As the appeal is being dismissed because the petitioner failed to establish that the proffered position is in a managerial or executive capacity, these additional issues, which were not raised by the director but are critical elements to establishing eligibility for this immigrant visa classification, will not be discussed further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.